

Fifth, the utilities may update their underlying costs annually through a simple formula, rather than a complex rate case, and pick up *all* current investment.

These are some of the ways in which the current formula provides for the sufficient recovery of "forward-looking" costs.

**F. The Electric Utilities Misconstrue The Commission's Pole Rate Mechanism And Complaint Process**

The electric utility comments also reveal a profound misunderstanding of pole rate approval mechanisms and the pole complaint process.

First, the formula is not indifferent to individual variation. The utility comments in their August 1996 White Paper appear oblivious to the freedom which pole owners have to rebut presumptions with credible evidence. For example, there is a *presumption* that the average amount of usable space on a utility pole is 13.5 feet, based upon an average of 35 and 40 foot poles. If, however, the utility's continuing property records show that poles are on average longer or shorter, it is free to come forward and show this to be the case.<sup>64</sup>

Likewise, there is a *presumption* in the formula of a 15% deduction for electric utilities (and 5% for telephone companies), for cross-arm and other expenses for which attaching parties receive no benefit. If the utility believes that this deduction should be smaller, again, it is free to come forward with evidence showing this to be the case. (Attaching parties theoretically have the same right. But because the utilities control all relevant evidence, it is only by accidental release of information that we discover that the cross arm deduction should be

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<sup>64</sup> This procedure is in sharp contrast to utility claims in this proceeding that the average height of utility poles was increasing while the usable space was decreasing. *See, e.g.*, White Paper at 10.

closer to 40%.<sup>65</sup>). The Commission has even permitted surcharges in extraordinary cases, such as repair of storm damage.<sup>66</sup>

Second, the pole rate and complaint process is nothing like a tariff regime as the utilities would have the Commission believe. If the utility believes that its publicly reported costs can justify a rate increase, it distributes notices of any such increased rate. Even if the rate is challenged, it goes into effect.<sup>67</sup> What would be akin to the Title II tariff-style regulation forbidden by the 1978 Act is the regime of individual-case-basis pricing advocated by the utilities. The present formula relies on existing, specifically defined and publicly reported asset and expense accounts, as directed by Congress.<sup>68</sup> The utilities seek to rely on increased amounts of internal company data that can only be verified, if at all, through discovery requests in litigation. The more the straight-forward complaint process degenerates from its original three-pleading and limited-discovery design, the more that original congressional and Commission intent for the speedy resolution of pole rate matters is undermined, and the greater the opportunity for utilities to favor their affiliates with prompt and preferential access to telecommunications customers.

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<sup>65</sup> See *Teleprompter Corp. v. New England Telephone & Telegraph Co. and Public Service Co. of New Hampshire*, PA-79-0044, Mimeo No. 002016 (July 14, 1981), *modified in part*, 56 R.R.2d 298 (1984), PA-79-0044, Mimeo No. 34556 (April 18, 1984) (a detailed breakdown of Account 364 shows 65.54% represents bare poles).

<sup>66</sup> *TeleCable of Piedmont, Inc., Cencom Cable Income Partners, II, L.P., Cencom Cable Entertainment, Inc., and Cencom Cable Television, Inc., TeleCable of Spartanburg, Inc. and TeleCable of Greenville, Inc. v. Duke Power Company*, PA 90-0003, PA 91-0001, PA 91-0002, DA 95-1362 (June 15, 1995). (Account 407.3 storm damage amortization from Hurricane Hugo may be added to maintenance under these unique circumstances. Case designated to ALJ to determine how much of Account 407.3 pertains to Accounts 364, 365, 369.)

<sup>67</sup> In this respect, the pole rate-setting process is not unlike the cable television programming rate complaint process where the Commission reviews allegedly excessive regulated cable programming rates at the request of cable customers and/or the cable operator's franchising authorities.

<sup>68</sup> S. Rep. No. 95-580 at 19-21 (1977); *Adoption of Rules for the Regulation of Cable Television Pole Attachments*, 68 F.C.C.2d 3 (1978).

In our initial Comments we described at length how some sectors of the cable television industry work with their counterparts at the electric and telephone companies to establish rates that comply with the FCC formula.<sup>69</sup> It is this process, and the knowledge that speedy recourse to Commission complaint procedures that has kept the overwhelming quantity of pole attachment rate matters out of the Commission's in-box, and resolved informally between the parties.

### **III. THE UTILITIES ADVOCATE NUMEROUS CHANGES TO THE POLE FORMULA WHICH DO NOT REFLECT ECONOMIC OR OPERATIONAL REALITIES OF POLE PLANT**

The utilities advocate a number of specific changes to both the investment and carrying charge components of the pole formula which seek to drive attachment rates to prohibitive levels.

#### **A. Utility Errors In The Calculation of Pole Investment Component**

##### **1. 30-Foot Poles Must Remain In Rate Base**

The first alteration that the utilities advocate to the calculation of pole investment, is to remove all thirty-foot poles from rate base. As we pointed out in our initial Comments this proposal presents many practical problems and works a fundamental unfairness on attaching parties.

First, on the merits, none of the utilities has offered empirical proof that 30-foot poles are unusable for joint use. The utilities participating in the August 1996 White Paper make the grossly inaccurate statement that "[p]oles of 30 foot [sic] or less simply do not have sufficient

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<sup>69</sup> Initial Comments of NCTA, *et al.* at 4-5.

usable space to accommodate attachments by any party other than an electric utility."<sup>70</sup> The electric's failure to proffer empirics in support of this assertion we can only presume is because the assertion is utterly unsupportable. In our initial Comments, we provided substantial evidence showing that 30-foot poles are today widely used.<sup>71</sup>

EEI, for its part, is considerably more circumspect and distances itself from the inaccurate assertions of the White Paper, stating only that 30-foot poles "generally are not suitable for a large number of attachments."<sup>72</sup> The prevalence of 30-foot poles is confirmed by the telephone industry, which has demonstrated that 30-foot poles remain widely used.<sup>73</sup>

Communications attachments can be accommodated on much shorter and much less expensive poles than electric attachments can be, both because of the safety concerns that attend the inherently dangerous nature of providing electric service, and because of the greater height above grade which the power loads now carried by the utilities demand.<sup>74</sup> As the telephone industry has confirmed, the electric utilities have been installing taller poles to accommodate their own service needs, while the needs of ILECs and cable operators has remained constant.<sup>75</sup> It is the attaching parties like cable operators that in their attachment rates

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<sup>70</sup> White Paper at 13.

<sup>71</sup> See Initial Comments of NCTA, *et al.* at 15-19 and Exhibits 7-8. See also Time Warner Cable Comments at 11-12.

<sup>72</sup> EEU/UTC Comments at 27, n. 12.

<sup>73</sup> See, e.g., USTA Comments at 26; GTE Comments at 14 (50%); U S WEST Comments at 3 (13%).

<sup>74</sup> This fact is corroborated by telephone company records. For example, we demonstrated in our initial Comments that fully 46% of poles owned by New York Telephone are 30 feet or less in height. See Ex. 8 attached to our initial Comments. Likewise, in their initial comments, U S West has shown that the average size of poles in their inventories is 38 feet, with 30-foot poles comprising 13% of poles deployed. U S West Comments at 3.

<sup>75</sup> See, e.g., USTA Comments at 25 ("The demand for taller poles is derived solely from the increased spatial needs of the electric utilities.").

have been dutifully assuming a proportionate amount of increased costs even though their own attachments can be accommodated on the shortest poles in inventory. The unfairness of removing 30-foot poles from rate base would only exacerbate the increasingly unfair cost burden falling to attaching parties to support increased joint pole heights which EEI/UTC estimate will average 45 feet within the next four years.<sup>76</sup>

Second, because utilities are not required to report publicly the number of thirty-foot poles that they have in service, elimination of thirty-foot poles from the rate base would require resort to internal, utility documents, a practice which the Commission's pole attachment procedures eschews.<sup>77</sup> Likewise, there is no procedure or proposal to offset the elimination of the smallest 30-foot and shorter poles with the elimination of the tallest poles which have the effect of increasing the costs of pole attachments.

Here (as in the case with the assignment of the neutral zone), the electricians are simply re-hashing arguments that this Commission has rejected before.<sup>78</sup> Nothing justifies the elimination of the 30-foot poles from rate base. Once again, if the electricians believe that there are unique circumstances in their pole networks that justify departure from the Commission's presumptions, they are free to step forward with specific evidence in specific cases. Nothing in the record warrants wholesale elimination of 30-foot poles from ratebase.

One alternative that the record *does* support is the adoption of different pole-height presumptions for electric company poles and telephone company poles. Because electric

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<sup>76</sup> UTC/EEI Comments at 27.

<sup>77</sup> 47 C.F.R. § 1.1404(g), (h).

<sup>78</sup> See Initial Comments of NCTA, *et al.* at 12-15.

company poles are higher than telephone company poles (because of their own service needs), we suggest that the Commission adopt a rebuttable presumption that the average electric utility pole is 40 feet tall (with 16 feet of usable space) with telephone company poles maintaining the average pole height under current presumptions of 37.5 feet (with 13.5 of usable space). This approach is akin to the adoption of different presumptions for electric and telephone company cross-arm investments (15% and 5%, respectively).

**2. There Is No Justification For The Addition Of Additional Costs Into Rate Base**

The utilities propose the addition of a number of other cost elements in the rate base, none of which is justified. In addition to the fact that the electric company proposals for adding new cost elements seek compensation for items from which attaching parties derive little or no benefit, adoption of the utility proposals would have the tremendous additional downside of turning virtually every rate dispute into a full-blown, discovery-laden rate case. This is so because each rate-adder the utilities seek to include would require the allocation of *portions* of FERC accounts into rate-base inputs.

In effect, the utilities would announce a new rate, with some or all of discrete additional accounts added to rate base, and attaching parties and the Commission alike would be confronted with the decision to take the utility assertion at face value, or to initiate a proceeding to ascertain the veracity of the utility's proposed allocator. This approach is so antithetical to the fundamental purposes of expedient pole-rate regulation that it should be rejected out-of-hand.

**a. Grounding Systems Should Not Be Added**

We have already shown in our initial Comments that there is no basis for allocating a portion of the electric utilities' grounding system costs to cable operators.<sup>79</sup> While cable operators often are required under contract to attach to these systems, they are inadequate to fully protect cable operator facilities from the damaging charges of lighting strikes, power surges and induced current that grounding systems are supposed to prevent. This is an interpretation with which FERC accounting rules are in accord.

**b. Right-Of-Way Costs Should Not Be Added**

The utilities claim that they should be compensated for their expenses associated with rights-of-way. This argument has no merit. Cable operators pay right-of-way and other related fees directly to the appropriate local government authority. Moreover, the utilities have failed to allocate their right of way costs across the physical property involved. If, for example, a utility incurs \$100 of right of way costs for placement of its outside plant, there is no reason that the entirety of those costs should be allocated to the 1 square foot of pole on either side of a 150-foot span. 150 feet of property is present in the right of way, and only 2/150th of the expense pertains to poles. Whatever *de minimis* amount might be attributable to the pole asset does not warrant further complexity in the formula.

**c. The Utilities' Proposals Fail to Account for Overcompensation from Account 364**

As noted at Section II.F, above, the actual value of bare poles within Account 364 is closer to 60%, while the present formula credits utilities with 85%. Because cable operators

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<sup>79</sup> Initial Comments of NCTA, *et al.* at 19-21.

do not have access to underlying account information, we are rarely able to avoid the overcompensation inherent in the current presumptions. We submit that this inexactitude which favors the utilities more than compensates for any theoretical inexactitude which operates in the opposite direction.

### **3. Treatment of Future Costs of Removal (The Southwestern Bell Petition)**

One of the very few intended purposes of this rule making was to address an anomaly arising in the pole attachment formula when a utility's depreciation reserve triggered its pole investment accounts. Much of the review on this issue was triggered by a seemingly innocent SBC proposal which both it and the electric companies have now seized upon to attempt a coup d'état against the current formula. We already have outlined the impressive list of benefits that the current formula has achieved.<sup>80</sup> Given SBC's penchant for strong resistance to facilities-based competition, the Commission should remain extremely skeptical of any campaign to change the current regime. The burden of persuasion rests on the proponents of change. Here that burden is particularly heavy.

With the Comments submitted on this issue, it has become apparent that occurrence of this SBC phenomenon depends on the depreciation, retirement, and asset replacement practices of each utility. For example, Bell South does not expect to encounter this situation.<sup>81</sup> Ameritech thinks it might in three to eight years, unless it changes out more poles at the request of CLECs.<sup>82</sup> Sprint expects it only within certain areas of certain states, which

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<sup>80</sup> See Initial Comments of NCTA, *et al.* at 2-8.

<sup>81</sup> BellSouth Comments at 6.

<sup>82</sup> Ameritech Comments at 1-2.



presumably would balance out to positive ratebase on statewide basis.<sup>83</sup> Yet, many have seized upon the anomaly as a pretext for going to an "all gross" formula, for revising depreciation generally, for revising the accounting of accumulated deferred taxes, or for some other radical reform. We will address the specific proposals below. But at the outset, we submit that the infrequency of the SBC occurrence does not merit wholesale revision of the formula.<sup>84</sup>

We offer this analogy. Under present rules, a rateable share of accumulated deferred taxes are removed from the pole rate base in order to eliminate a return on zero cost capital. However, the Wisconsin Public Service Commission provides for the inclusion of accumulated deferred taxes in the depreciation reserves reported on a utility's annual report, so application of the standard formula results in twice removing the same capital component. The Commission fixed this by specific-case adjudication, rather than by wholesale revision to the formula.<sup>85</sup>

We therefore oppose the suggestions of GTE and USTA that the Commission's limited proposed fix for these special cases should be available in any case at the option of any utility. This suggestion would be no more appropriate than allowing ADT to be added back into

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<sup>83</sup> Sprint Comments at 6-7.

<sup>84</sup> For example state public service commissions utilize different approaches for calculating a utility's overall rate-of-return, with some factoring accumulated deferred taxes ("ADT") in as zero-cost capital. The formula is sufficiently resilient to depart from that practice in those cases where ADT is factored into overall return as zero cost capital. *Group W Cable, Inc. v. Wisconsin Electric Power Co.*, PA-82-0062, Mimeo No. 35729 (April 19, 1985).

<sup>85</sup> *Group W Cable, Inc. v. Wisconsin Electric Power Co.*, PA-82-0062, Mimeo No. 35729 (April 19, 1985).

rate base in all cases in all states because Wisconsin utilities find that ADT already is accounted for in their depreciation.<sup>86</sup>

In addition, we question the need to account for this sporadic occurrence on an industry-wide basis, rather than on an individual-case basis, because to our knowledge this issue has not come up in general ratemaking for the ILECS taking this view, or for the electric utilities. Over the years these companies have enjoyed the benefits of accelerated depreciation (and cash flow) without any strained theoretical objection to including "negative" pole rate base in those calculations.

Some parties commenting on this issue have pointed out that accounting for accumulated depreciation attributable to negative salvage may be complex.<sup>87</sup> We agree that this in fact may be the case for some utilities, which is why individual analysis of specific data is necessary before this treatment can be applied to any company. Under our proposal, if adequate accounting is not available to extract negative net salvage, the option of freezing rates at the last level where the rate base was positive level until the accounting cycle catches up again, is always available. This is a suggestion also endorsed by AT&T.<sup>88</sup> Given the potential complexity of the various alternatives, this approach could be adopted as the solution of first resort.

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<sup>86</sup> GTE and SBC take issue with FCC analysis that there is overrecovery of maintenance in early years and underrecovery in later years. GTE Comments at 6; SBC Comments at 13-14. We believe that GTE has confused aggregate analysis with analysis of the vintage. SBC disagrees with the Commission's reasoning regarding recovery over life of the asset. SBC Comments at 14. We believe that SBC's analysis is premised on the erroneous assumption that the recovery is only from attaching parties, when they obtain the preponderance of cost recovery from ratepayers.

<sup>87</sup> See, e.g., SBC Comments at 6.

<sup>88</sup> AT&T Comments at 16.

## **B. Utility Errors In The Calculation Of Carrying Charges**

The utilities advocate a number of erroneous positions relative to the calculation of carrying charges, supplementing their efforts to load as many expense accounts into the various carrying charges. The most fundamental of these errors is the utility position that charges should be calculated on an all-gross basis.

### **1. Carrying Charges Should Not Be Calculated Against Gross Rate Base**

The telephone and electric utilities alike raise a number of arguments that they claim justify moving to all-gross calculations. The FCC has long had a preference for using net calculations are far preferable than using gross calculations.<sup>89</sup> There are sound practical and economic reasons for not migrating to an all-gross regime.

First, "all gross" is a misnomer; all gross is not all gross, as even some of the telcos point out.<sup>90</sup> As we pointed out in our initial Comments, it is still necessary to perform a net-book calculation to arrive at the proper rate of return.<sup>91</sup> In many cases, it is necessary to do so to derive the appropriate depreciation carrying charge, which today may be prescribed for application to *net* book investment.

Second, an all-gross approach fails to account for poles which are replaced at third-party expense through makeready. Under FERC accounting, capital pole costs which are

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<sup>89</sup> See, e.g., *TeleCable of Piedmont, Inc., Cencom Cable Income Partners, II, L.P., Cencom Cable Entertainment, Inc., and Cencom Cable Television, Inc., TeleCable of Spartanburg, Inc. and TeleCable of Greenville, Inc. v. Duke Power Company*, PA 90-0003, PA 91-0001, PA 91-0002, DA 95-1362 (June 15, 1995), *Riverside Cable TV Inc. v. Arkansas Power & Light Co.*, PA-85-0001, Mimeo No. 4813 (June 30, 1985).

<sup>90</sup> See, e.g., SBC Comments at 9.

<sup>91</sup> Initial Comments of NCTA, *et al.* at 24-25. Some parties, however, appear to be unaware of this mechanical but very important operation of the formula. See USTA Comments at 6-8; GTE Comments at 7-9.

recovered from third parties are supposed to be added to the gross amount of Account 364 and also to the accumulated depreciation reserve of Account 364. If one were to make a pole rent calculation on the gross rate base, the pole formula would result in cable operators' payment of the fully-allocated rent on all poles, calculated as though the utility had made a capital investment which it had not. This would exacerbate the already unfair feature of paying fully-allocated cost-based rent on poles which cable operators have already paid for completely through makeready.

Third, moving to gross-based calculations is inappropriate because it fails to account for recovery of investment from other ratepayers through depreciation charges. This situation is most pronounced in conduit, where investment often has been fully paid for by electric and telephone ratepayers. If, however, poles are half paid for, (half depreciated) there is no reason to ignore that recovery and treat it as fresh investment; doing so simply does not reflect the true economic cost. Ignoring the depreciation charges taken against the asset, and the contributions that other ratepayers have made over time, is as inappropriate as pricing pole and conduit rentals on the basis of reproduction costs.

Fourth, and because of the foregoing, in our experience a calculation using "gross" figures therefore almost always increases the rent substantially.<sup>92</sup> Such a result is particularly unfair in the area of pole attachments where the Commission's formula already sets the attachment rate at the upper end of the statutory limit, while cable operators already pay, in the form of makeready, all the utility's incremental costs associated with its attachments. Indeed as we have shown in our initial Comments, and as further reflected in the makeready invoices (or

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<sup>92</sup> In our experience, gross typically produces a higher ultimate rate than net basis, which is why the utilities seem to express such strong preference for it, and contrary to SBC's carefully phrased suggestion to the contrary. SBC Comments at 8. This is so, in part because of the failure of the all-gross approach to account for prior recovery of investment from third parties.

pole agreements) appearing at Exhibit 1, pole owners routinely include a generous additional overhead loading factor in addition to their standard (but virtually unverifiable) engineering expenses. For example, in a recent proceeding, an electric utility showed that its standard labor loader for engineering included: 42.56% for employee benefits (union, safety training, vacation, sick time, holiday time, medical, pension, 401(k), insurance, FICA, unemployment); plus a general overhead loader of 15.74% , and additional loaders for storeroom expense, transportation.<sup>93</sup>

Fifth, the technical reasons offered in support of a "gross" methodology simply do not hold up. To support their position on gross, EEI/UTC, for example, claim that embedded costs cannot track the utility's real costs of providing pole space.<sup>94</sup> EEI says that the Commission must move to gross to recover the increased cost of pole disposal. But utilities can and do recover their pole removal cost through depreciation charges over the life of the asset. They say that gross-based calculations are needed to recover the utility's increased liability exposure as a result of third-party attachments. But they fail to disclose that utilities already are fully protected by expansive indemnity provisions in their pole license agreements, and by extremely high licensee insurance coverage requirements.<sup>95</sup> EEI says that gross calculations are needed to recover utility costs associated with emergency call centers. But they fail to acknowledge that cable operators and others join and participate in one-call operations and incur their own costs in this regard.<sup>96</sup> And, finally, they say that gross costs are needed to recover the costs of safety

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<sup>93</sup> *Bangor Hydro-Electric Co.*, Maine PSC Docket No. 97-168, Bangor Hydro-Electric Response to Oral Data Request 1b of the New England Cable Televisions Association (June 20, 1997) (non-confidential).

<sup>94</sup> EEI/UTC Comments at 38.

<sup>95</sup> *See, e.g., Marcus Cable Assocs., L.P. v. Texas Utils. Elec. Co.*, PA No. 96-004 ¶ 20 (released July 21, 1997).

<sup>96</sup> EEI/UTC Comments at 38.

education. They seem unaware that safety education is a reciprocal field responsibility of all parties. Indeed, invoking the mantra of safety rings particularly hollow given USTAs' showing that electricians are already "pushing the envelope of the NESC safety margins" in their own construction practices.<sup>97</sup>

Sixth, where as here, the utilities are advocating a reproduction or replacement cost methodology, an additional carrying charge problem arises. While a reproduction cost approach attempts to derive some reproduction trended-forward rate base for pricing pole plant, the carrying charge component of their methodologies typically would be derived against the actual embedded costs of the utilities. This approach would allow the utility to recover windfall returns of entirely fictitious "expenses," and carrying "costs" for plant the regulator is asked to assume will be replaced today but will not be.

For example, if the cost of a new pole is \$300 but the embedded cost is \$100, a return of 11.25% would yield an effective return of 34%, rather than the authorized return of 11.25%. To properly develop a reproduction cost carrying charge rate would require a far more carefully developed carrying charge development, one fraught with dispute and the potential to consume administrative resources. Each component of the carrying charge would need to be reduced substantially for application to an inflated rate base. If, in the end, a levelized carrying charge recovers no more than the current formula, as some suggest, we question the need to

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<sup>97</sup> USTA Comments at 23. *See also*, Supplemental Declaration of Nicholas Theroux ¶¶ 10-11 (hereinafter "Theroux Supp. Decl."). Mr. Theroux shows that even after requiring a cable operator to perform detailed engineering work and to secure advance permits for overlash attachments, the electric utility will often subsequently place its facilities on a pole, pushing the pole into violation of both applicable loading guidelines and clearance requirements. These facts show that both the utilities' requirements for advance permitting for overlash attachments are largely a ruse, and that utilities discriminate in favor of themselves and their affiliates in the application of safety codes for access determinations.

adjust the formula at all. In the long run, all that we would be buying is complexity which defies the congressional mandate for expedition.

## **2. Pole Rents Should Be Excluded From Maintenance Charges**

Ameritech advocates the allocation of a portion of pole rentals it pays to electric companies to attaching parties through the maintenance charges. We have already shown that because cable operators pay independently for their own attachments to power poles,<sup>98</sup> it is fundamentally unfair to make them pay a second time through the inclusion of rents in this carrying charge. This would amount to a pure windfall subsidy, over and above what the telephone company has bargained for with the electric company, from a direct competitor in cable's core service market. Given the considerable efforts which regulators (like the Public Utility Commission of Ohio) have invested to arrest other subsidies, such as the use of "Americhecks" and preferential pole construction practices to promote Ameritech New Media Enterprises, the Commission should not permit LECs to charge cable operators with the rents the LECs pay for their own attachments to power poles.<sup>99</sup>

## **3. The Accumulated Deferred Tax ("ADT") Figure Should Not Be Taken From The Utility's Internal Non-Public Accounting Records**

USTA and several of its members commenting individually argue that accumulated deferred taxes ADT should be taken from internal books, rather than derived on a *pro rata* as the Commission currently does. This suggestion is misplaced for two reasons.

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<sup>98</sup> Initial Comments of NCTA, *et al.* at 36.

<sup>99</sup> *Ohio Telecommunications Association v. Ameritech Ohio*, Case No. 97-654-TP-CSS (Pub. Util. Comm'n Oh. July 17, 1997); *Ohio Telecommunications Association, et al. v. Ameritech Ohio*, 1997 Ohio PUC LEXIS 288, Case No. 96-1027-TP-CSS (Pub. Util. Comm'n Oh. April 17, 1997).

First, resorting to internal non-public company records defeats the compelling interest in calculating pole attachment rates on the basis of public information, a position which these companies otherwise advocate.

Second, calculating ADT in this fashion would defeat the very purpose of removing ADT from rate base in the first place. Mechanically, the carrying charges for the tax and administrative component have been computed at an inflated level, on the assumption that the ratebase has been proportionately reduced for removal of ADT. For example, suppose that a pole, net of depreciation, is \$100, and an administrative carrying cost of \$50 is incurred for every \$1000 of plant investment. If the overall plant has an ADT of \$200, the administrative component of the carrying charge is calculated as  $\$50/(\$1000-\$200)=6.25\%$ , rather than  $\$50/\$1000=5.0\%$ . If the 6.25% is applied to a ratebase which has been reduced ratably by 20%, the return would be  $(\$100-\$20)*6.25\%=\$5$ , which is the precise ratable amount of administrative costs which should be borne by poles. But if the pole investment is not reduced ratably, the carrying cost is artificially inflated. For example, if the supposed "pole" ADT is deemed to be \$5, rather than \$20, then the administrative costs would be  $(\$100-\$5)*6.25\%=\$5.94$ , far more than is intended. Indeed, the overall resulting pole rate is greater than if we had not accounted for ADT at all, and just allowed the utility to earn a return on zero-cost capital.<sup>100</sup> Clearly, the telephone gambit to surreptitiously increase pole rents by adjusting ADT should not be permitted.

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<sup>100</sup> See Ex. 2.



#### **4. The Commission Methodology For The Calculation Of The Depreciation Carrying Charge Results In Utility Overrecovery**

In our initial Comments we showed that grossing up the depreciation rate for application to net plant may result in unwarranted inflation of the depreciation charge.<sup>101</sup> If a depreciation rate of 6% has been developed on remaining life for application to net plant, then the permitted charge should be  $\$100 (\text{net pole}) * 6\% = \$6$ . Instead, using the "grossing up" method (developed when depreciation was calculated for application to gross plant) on plant which is half depreciated would yield  $\$100 * 6\% * [\$100 / (\$100 - \$50)] = \$12$ . In these cases there should no gross up of the depreciation charge factor as is currently occurring under the pole formula. The depreciation charge should only be grossed up if it has been prescribed for application to gross plant,<sup>102</sup> not net plant. Bell Atlantic/NYNEX, however, seek to preserve and extend this demonstrably inaccurate approach.<sup>103</sup>

Exhibit 4, attached to these Reply Comments shows the flaws of calculating the depreciation carrying charge in this manner based on actual depreciation data of Entergy Gulf States.

#### **5. Rate-Of-Return Component**

USTA generally supports the Commission's proposal to use the 11.25% rate of return, but states that the utility should have the option of using its last-known return.<sup>104</sup> We re-

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<sup>101</sup> Initial Comments of NCTA, *et al.* at 25.

<sup>102</sup> Ex. 3.

<sup>103</sup> Bell Atlantic/NYNEX Comments at 5.

<sup>104</sup> USTA Comments at 17.

emphasize our point made on in our initial Comments that the Commission should use the 11.25%, but that if it is to allow the utility to resort to last recorded rate of return, so too would it be appropriate to utilize the realized return on its regulated business.

## **6. Administrative Component**

The telephone utilities by and large agree with the FCC's Part 31-to-Part 32 mapping proposal. For all the reasons set forth in our initial Comments, we continue to believe in the inclusion of only those expense accounts we specifically addressed. No new arguments have been advanced by the telephone companies. Makeready and inspection charges already contain ample "overhead" charges which more than make up for any theoretical deficiencies which a company might believe it suffers. See Exhibit 1.

NYNEX asks that the administrative component be calculated on an all-gross basis. NYNEX's arguments were made and rejected at the New York Public Service Commission this year.<sup>105</sup> As the FCC's Notice properly recognizes, although the amount of recovery over the life of a particular asset may vary, in the long run and in aggregate any periods of theoretical underrecovery (in the out years of an asset) will be compensated by earlier years' overrecovery, for which we do not hear the utilities volunteering any refunds.

### **C. The Utilities' Position On Usable Space Must Be Rejected**

As we have already pointed out, the utilities take the untenable position that pole heights are increasing but that usable space is decreasing. Taller poles are taller because of needs of the electrics' higher voltage power conductors which require greater above-grade clearances

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<sup>105</sup> *In the Matter of the Proceeding on Motion of the Commission to Consider Certain Pole Attachment Issues*, N.Y. Pub. Serv. Comm'n. Case No. 95-C-0341 (Issued and effective June 17, 1997). (Ex. 2 to Initial Comments of NCTA, *et al.*).

and more sag.<sup>106</sup> Cable operators have been sharing higher the costs of these higher poles that the utilities need for their own service, and by creating a misleading picture of the pole engineering and construction practices, and safety code requirements, the electric utilities only seek to make it worse.

### **1. Minimum Grade Clearance**

At page 49 of its Comments, AEP argues that it is impossible to meet the National Electrical Safety Code's ("NESC") requirement of mid-span grade clearance of 15.5 feet on a pole shorter than 40 feet. This is not the case. In our initial Comments, we explained the engineering basis by which shorter poles can and are used for communications attachments, a position which has now been empirically corroborated by the telephone industry.<sup>107</sup> The sag calculation offered by AEP,<sup>108</sup> bears little resemblance to real-world communications attachments.

For one thing, the utilities seem to be assuming that cable operator and modern telecommunications attachments are 300-pair copper loop bundles as is common with telephone construction. They are not. Cable operators install fiber optic and coaxial cable which are the lightest and thinnest conductors on the poles. For another, even apart from current safety codes, attachments placed under older codes—such as the one in force when the FCC first adopted its presumptions—are grandfathered under the express terms of NESC Rule 013B. It would be fair to assume that poles which, as SBC has said, are old and have been old for some time,<sup>109</sup> carry

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<sup>106</sup> See Initial Comments of NCTA, *et al.* at 10; Comments of USTA at 25.

<sup>107</sup> Ameritech Comments at 3; Bell Atlantic/NYNEX Comments at 11.

<sup>108</sup> Comments of AEP, *et al.* at n. 117.

<sup>109</sup> SBC Comments at 16.

grandfathered attachments as to which nothing has changed. These are precisely the kinds of engineering concerns that belong in individual cases. There is simply insufficient evidence from which to conclude that usable space has decreased because of increasing height requirements.

**2. The Neutral Zone Should Remain Assigned To The Electric Company**

As we have shown, but for the use by the electric company of the top portions of the pole, there would be no need for the neutral or safety zone extending 30 to 40 inches from the top communications conductor to the bottom electric conductor. If one assumes a pole where there are only communications attachments and no electric company attachment (and there are many of these kinds of poles in service), there is no neutral zone and no associated costs to be assigned. In order for the electric company's attachments to comply with NESC requirements it needs the aggregate vertical space clearances that communications attachments need, plus the space that the communications contacts occupy, plus the neutral zone.<sup>110</sup> Moreover, it is the electric company's conductors that are inherently dangerous; the required separation that the neutral zone provides is no different from the separation that utility must maintain between and among its attachments in the electric space.

The electric industry's arguments that the neutral zone is required for the safety of communications workers is just a repetition of the same arguments that it advanced and lost

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<sup>110</sup> The electric utilities likewise argue that the NESC requires that electric conductors maintain 30 inches of clearance at midspan, which, because of the greater sag in electric conductors, requires them to attach their facilities at the pole in excess of 40 inches above the highest communications wire. Joint Comments of Electric Utilities Coalition at 36. This admission proves that indeed it is the electric utilities that require the taller more expensive poles for their service requirements for which cable operators and others already are paying a disproportionately large share.

in the 1978 original pole rulemaking<sup>111</sup> and nothing has changed since then to justify their acceptance now, nearly 20 years later.<sup>112</sup> Electric industry claims that the Commission's decision to assign all of the neutral zone where base on a skewed reliance on 1978 legislative history are misplaced. They claim that because Congress appeared not to be aware of the 40 inches then allocated to neutral zone, that the FCC's decision to assign this space in effect fails to allow the utility to recover their incremental costs of third-party attachment.<sup>113</sup> In addition, the utilities are wrong that they do not recover their incremental costs of recovering pole space. The utilities recover these costs through makeready payments for work undertaken to accommodate the new attachment.

In addition, the utilities are incorrect that the neutral zone is not used for revenue generating purposes. The utilities claim that street lights, perhaps the most common type of appurtenance found in the neutral zone, are only for public safety reasons and that the utilities by and large receive no revenue from streetlight attachments. The fact, however, that utilities routinely file tariffs (or in some cases unilaterally set attachment rates) for providing streetlight space and services belies this utility assertion.<sup>114</sup>

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<sup>111</sup> *Adoption of Rules For The Regulation Of Cable Television Pole Attachments*, CC Docket No. 78-144, 72 F.C.C.2d 59 (1979); 77 F.C.C.2d 187 (1980).

<sup>112</sup> In addition to this attempt to re-hash old arguments, the electric utilities argue that because the Commission does not consider the utility's tallest poles in enumerating space allocations, it must disregard the utility's shortest poles for the purpose of calculating the net cost per bare pole. This argument, of course, compares apples with oranges. The Commission uses investment in all poles when calculating its rates to calculate carrying costs. *Teleprompter v. Southwest Video Corp.*, PA No. 80-0016, Mimeo 33920 (Oct. 24, 1983). Utilities may always produce actual pole height records.

<sup>113</sup> Joint Comments of Electric Utilities Coalition at 36.

<sup>114</sup> See, e.g., Discovery Response of Detroit Edison Company in Mich. Pub. Serv. Comm'n Case No. U-10831 To Request No. 32 of the Michigan Cable Telecommunications Association (Ex. 5) ("Charges for streetlights and traffic signals are billed pursuant to MPSC approved tariffs and under municipal agreements. Rental rates for attaching parties referred to in [this question] are based on the MPSC approved attachment rate."); Discovery

What has changed since the Commission's prior findings that the neutral zone be assigned to the electric company is the NESC. The 1997 NESC now allows electric utilities to install communications cable in the neutral zone,<sup>115</sup> a fact of which the utilities are acutely aware and are exploiting.<sup>116</sup> Given the speed and zeal with which utilities are deploying fiber across the electric grid to compete directly with cable operators and others,<sup>117</sup> any claim that the utilities make that the neutral zone cannot be used for revenue generating purposes is not credible.

Because electric utilities now can and do make use of the neutral zone for the installation of revenue-producing fiber, it is entirely proper to characterize the entire neutral zone now as usable space. The Commission was correct in assigning the neutral zone to usable space. The fact that utilities are using the neutral zone for the installation of fiber optics provides yet another basis for reaffirming that conclusion.<sup>118</sup>

Next, the electric utilities argue that local codes like those in effect in California, require a safety space greater than 40 inches, implying that this greater space requirement effects

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Response of Consumers Power Co. in Mich. Pub. Serv. Comm'n Case No. U-10831 To Request No. 32 of the Michigan Cable Telecommunications Association (Ex. 6) ("The rental rates for [street lights, alarm system equipment and other non-cable, electric or telephone equipment] . . . are not cost-based rates; rather they would be described as market-based rates.").

<sup>115</sup> NESC Sections 224A, 230F.

<sup>116</sup> See, e.g., Union Electric Comments at 26 (noting that horizontal installations in neutral zone are only as to current carrying conductors, indicating an awareness that *communications* conductors installed in this space would not run afoul of NESC restrictions). The telephone industry has indicated, moreover, that electric companies use the neutral zone to avoid changing out to taller poles, presumably for their core electric service needs, as well as for their expansion into telecommunications services. USTA Comments at 23.

<sup>117</sup> See, e.g., *Marcus Cable Assocs., L.P. v. Texas Utils. Elec. Co.*, PA No. 96-004 ¶ 23 (released July 21, 1997).

<sup>118</sup> The utilities contend that cable operators no longer remain "at risk" to replace the neutral zone through subsequent makeready. To the contrary, the Commission made clear in the *Local Competition Order* that electric utilities could reserve space for their *bona fide* planning for core business. *Local Competition Order* ¶ 1169.

pole rental pricing.<sup>119</sup> It does not. The State of California has codified 7.4% as its pole space allocator, precisely that set by this Commission.<sup>120</sup>

### **3. The Pole Top Is Usable And Can Be Expanded**

Carolina P&L and others urge the Commission to treat the topmost portion of the pole as unusable. This was rejected 19 years ago in light of evidence that utilities use pole top extenders to make every inch of pole usable. There is no evidence to support a departure from that treatment today.

### **4. Capacity Factor**

AEP contends that rather than following the usable space criteria prescribed by the Act,<sup>121</sup> the Commission should calculate holding capacity element, which would account for ice and wind loading. Not only is this contrary to the terms of the Act, but AEP's claim that it is much too difficult to explain reveals the proposal to be unworkable, and unreviewable, and probably designed to frustrate, rather than facilitate, third-party attachments.

### **5. Overall Use Ratio**

The sample calculations offered by the utilities of their preferred usable space approach demonstrate that approach's absurdity.<sup>122</sup> CP&L, for example, calculates a video use ratio of 17.98% on a pole greater than 30 feet. This amounts to nothing less than a complete repudiation of the 1996 Act, which maintained the present formula for cable services and stepped

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<sup>119</sup> See, e.g., EEI/UTC Comments at 32-33.

<sup>120</sup> Cal. Pub. Util. Code § 767.5 (Deering 1996).

<sup>121</sup> Comments of AEP, *et al.* at 75.

<sup>122</sup> CP&L Comments at 37.

up to a higher allocation only for telecommunications and only at year 2006. Even for that rate, for which there will be a separate rulemaking, there is not a shred of evidence that Congress was expecting a wholesale revision of the usable space formula. All that was expected was a reallocation of non-usable space. Given the widespread support and empirical basis for retaining the current use formula—including support from USTA—the Commission should reject the utilities' space proposals, and instead retain the 1/13.5 figure for telephone and adopt a 1/16 presumption for power.

**6. The Commission Should Not Require Additional Permitting Or Allow Additional Charges For Overlashes**

The utilities raise a number of arguments about the need to impose identical permitting requirements to overlashed facilities as to initial attachments. The utilities do so under the pretense that such additional permits are required to ensure the integrity of their pole plant and worker and public safety.<sup>123</sup>

Overlashing is performed in the ordinary course of business.<sup>124</sup> It is used to add new trunk runs, redirect trunks to new hubs, replace deteriorated conductors, and increase bandwidth. The electric industry never showed a concern for overlashes until cable operators began overlashing *fiber* instead of coaxial cable, and until electric companies set their sights on the commercial telecommunications market. Only then did pole owners find "problems" with overlashing practices that had been followed since the inception of the cable industry. A real-

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<sup>123</sup> See, e.g., EEI/UTC Comments at 36-37; Comments of AEP, *et al.* at 72-75.

<sup>124</sup> Theroux Supp. Decl. ¶ 8.



world example will illustrate the practical result for which the utilities here specifically seek the Commission's imprimatur.

Picture the race between the new Utilicom joint venture<sup>125</sup> (or any of the myriad new electric utility commercial telecommunications ventures) with brand new fiber in the power space and a cable operator or CLEC overlashing additional fiber to existing strand. Both are seeking to sign up new customers in a given area. Because of Utilicom's affiliation with the electric utility, and, because the fiber can be installed in the electrical space, it, for all practical purposes, will have immediate access to electric pole space, without permitting or makeready delays. Even though Section 224(f)(1)<sup>126</sup> requires the electric utility to provide non-discriminatory access to its poles, by imposing a permitting requirement for overlashes, the utility has just bought itself at least an additional 45 days (in addition to additional delays that would ensue until makeready is completed)<sup>127</sup> in which to favor its affiliate, to deploy its own fiber and lock up customers while the competitor's overlash application is ordered to languish on an electric manager's desk.

Fiber overlashes add only nominally to the total mass on a pole.<sup>128</sup> Utilities such

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<sup>125</sup> Utilicom Networks Inc. seeks joint ventures with small electric utilities to design, build, finance, and operate advanced interactive communications networks in suburban and rural markets. Examples of Utilicom's joint ventures include its collaborations with Clay Electric Cooperative and its proposed venture with Bangor Hydro-Electric. See *Television Digest*, June 2, 1997; *Communications Daily*, April 29, 1997; Teresa Hansen, *Value-Added Services Are Not Just For Large Utilities*, *Electric Light & Power*, September 1996, at 24.

<sup>126</sup> 47 U.S.C. § 224(f)(1).

<sup>127</sup> 47 C.F.R. § 1.1403(b).

<sup>128</sup> With respect to the actual loading that fiber attachments place on the pole, at page 28 (note 12) of their initial comments, EEI/UTC assert: "[A]n electric transformer attached to a pole can weight [sic] 300 pounds and occupy three feet of space. Although a fiber optic cable occupies far less space than a transformer, it actually weighs far more, especially when fully wind- and/or ice-loaded." EEI/UTC Comments at 28, n. 12. This assertion is patently false.